AUG 29 1991
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No. 91-170

In The

Supreme Court of the United States

October Term, 1991

HAZEL HILL,

Petitioner,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE; MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; O.H. SIMMONS, HUGH GIBSON, WILLIAM G. LEONARD, AND MARY BRYANT, COMMISSIONERS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

MISSISSIPPI STATE EMPLOYMENT SERVICE, ET AL.

RICHARD D. MITCHELL*
FRED J. LOTTERHOS
P.O. Box 1699
Jackson, MS 39215-1699
(601) 961-7416

Counsel for Respondents

*Counsel of Record

August 29, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the defendant state job referral agency met its burden of rebutting the plaintiff's prima facie showing of racial discrimination by detailing specific problems within its system which contributed to the plaintiff not receiving as many job referrals as she would have liked.

2. Whether the ruling in this case conflicts with this Court's holding in *Bazemore v. Friday* or other Circuits as it relates to the petitioner's defective statistical evidence.

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STATEMENT OF THE CASE

Hazel Hill, a black female, began seeking job referrals from the Mississippi State Employment Service (MSES) in April 1982, by submitting her application with the agency's Hattiesburg office.[1] At that time each local office kept hard copy applications for individuals seeking employment and assigned to each applicant one or more nine digit Dictionary of Occupational Title Codes, or DOT Codes. When a local employer desires to use MSES to fill a job opening, it submits a job order specifying the position available and designates the minimum qualifications required for the job. MSES then attempts to refer to the employer the best qualified applicants available. Once MSES refers an applicant, it has no control or input on who is offered the position.

Due to the type applicants and employers that for the most part utilize this free job referral service, there are usually a multitude of candidates that meet the minimum qualifications for each position and are therefore eligible for referral. One interviewer stated that at times she had reviewed as many as fifty (50) applications to make one referral. (Tr. 641) As a result, only a small percentage of the minimally qualified applicants are referred. Also, because many applicants are very well qualified for more than one position and are assigned multiple DOT codes, it is not uncommon for the agency to refer an applicant to

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[1] MSES is the employment service division of the Mississippi Employment Security Commission and is established and funded entirely by federal funds through the Wagner-Peyser Act, as amended, 29 U.S.C. § 49-49k.

a vacant position whose code does not "match" the primary or first code listed on the application. In many instances however, this person is the best qualified applicant. Because of these factors, *i.e.*, the availability of numerous qualified applicants for each vacancy and the agency's authority to refer applicants based on a secondary or different code, many of the lesser qualified applicants erroneously feel that they have been slighted or mistreated.

Petitioner Hill was coded for two of the agency's most popular positions, cashier-checker (211-492-014) and waitress (311-477- 080).[2] During the life of Hill's application, the Hattiesburg office maintained an average of 3405 active files per month. On average, 1984 or 58.3% of the applicants were white and 1421 or 41.7% were black. Within the codes preferred by Hill, blacks made up 34.1% of the 211 job pool and accounted for 30.8% of the referrals. In the 311 job pool, 49.9% were black and blacks received 45.5% of the referrals. Unfortunately, as stated above, only a small percentage of the total applicants, regardless of race, actually received referrals to a position. Specifically, only 13.5% of all 211 applicants were referred and 31.5% of the total 311 applicants received referrals.

After hearing all of the evidence, the Magistrate ruled that Hill established a prima facie case of intentional discrimination pursuant to *McDonnell Douglas*

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[2] The code's first set of numbers refers to a particular occupational group, the middle set identifies the tasks required of the job and the last set is the alphabetical listing of the titles within the six digit code.

Corp. v. Green, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1980); *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1987) *vacated and remanded on other grounds*, 487 U.S. 977 (1988); and *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir., 1983). The Magistrate recognized however, that the incidents raised by Hill were isolated occurrences which resulted from various race-neutral problems inherent in the defendant's system. Among the problems inherent in a hard paper copy system as large as the free state-wide employment service were employee error or oversight, lack of efficient communication between staff members regarding active and inactive job orders and applicants, inability to contact applicants, applicants' preferences, *e.g.* requiring full time/part time work, specifying salary floors, etc., and other racially neutral problems. The Court stated that while these problems obviously affect referrals and will sometimes lead to disparities in these referrals, they were not discriminatory.[3] Thus, the District Court held that the non-discriminatory reasons offered by the agency were legitimate problems encountered in the daily operations of MSES and were sufficient to overcome Hill's prima facie case. App. 56a. (citations refer to petitioner's appendix page numbers) The Fifth Circuit agreed and stated upon their de novo review that MSES had "offer[ed] . . . details [of] the numerous problems that produce[d]" any disparity. *Hill v. Mississippi State Employment Service*, 918 F.2d 1233, 1239 (5th Cir. 1990), App. 15a.

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[3] As a tactic to discredit MSES, the petitioner takes great joy and effort in describing the agency's work as "pervasive incompetence". While the agency takes no pride in acknowledging shortcomings within the system in 1982, no where through the prior proceedings has MSES been described as incompetent, either by the petitioner or any court.

In her attempt to show pretext, Hill relied on statistical evidence. The Courts held that she did not satisfy her burden due to the fact that the statistics offered by her contained numerous fatal defects. First, the numbers relied on by Hill were not compiled for the purpose for which she attempted to utilize them. The numbers that she used were derived from a system that had a sole purpose of tabulating the total number of referrals made by MSES, which in turn was used by the United States Department of Labor to determine agency funding under the Wagner-Peyser Act. Because the numbers were not compiled for the purpose of determining rankings, education, experience, qualifications, job or salary preferences, race, sex, age or any other characteristic of the applicants, a statistical analysis of them in an attempt to prove discrimination, the Courts ruled, was futile. Thus, the District Court correctly held that Hill's statistics which did not or could not consider the above crucial factors were "suspect" and "flawed", and any reliance thereon would produce "tainted", "misleading", and "prejudicial and unfair" results.[4] App. 57-58a.

To further cloud the issue, the numbers offered by Hill could not identify if an out of code referral went to an applicant that was in fact *more* qualified than an in code applicant but who simply listed the job as a second,

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[4] Petitioner argues that education and experience is included in the statistics because they are considered when the interviewer assigns a DOT code. This ignores the fact that this case is not based on discriminatory coding, but rather on referrals where the comparative qualifications of the applicants are critical. Therefore, the referral statistics offered by Hill did omit critical factors such as education and experience and as a result, are fatally incomplete.

but not necessarily lesser choice. Finally, and possibly the most important aspect lacking in Hill's analysis, is a ranking of the applicants' qualifications. This is especially significant when considering that the purpose of the referral system is to place the most qualified applicant.

Even if the statistics had contained all relevant information, it is clear that the analysis thereof did not show what Hill sought to prove. The percentage of referrals by race to the jobs in question (both in code and out of code) were almost identical to the racial composition of the pool of available applicants. As the Fifth Circuit stated, no unlawful inference can be drawn from such a clearly race neutral result. *Hill*, 918 F.2d at 1240, App. 17a, citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80 (1978). In addition, as will be discussed later, evidence proved that what deficiencies there were in service equally transversed both racial and gender lines.

The Courts held that Hill's statistical evidence, because of its many defects, failed to show that the non-discriminatory reasons offered by MSES were pretextual. As a result, Hill could not prevail in her disparate treatment claim. Hill then attempted to prove discrimination through adverse impact. Once again however, the Courts, after considering all of the evidence, both statistical and non-statistical, determined that Hill failed to show any unlawful discrimination.

REASONS FOR DENYING CERTIORARI

I. THE REASONS OFFERED BY MSES ARE LEGITIMATE NON-DISCRIMINATORY REASONS SUFFICIENT TO REBUT HILL'S PRIMA FACIE CASE

The burden and allocation of proof required to show unlawful discrimination under the disparate treatment theory is well established. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). A plaintiff must show that she is (a) a member of a class protected by Title VII, (b) qualified for the position she seeks, (c) she does not acquire the position and (d) someone else received the position. *Burdine*, 450 U.S. at 255. The burden then shifts to the defendant to articulate some legitimate non-discriminatory reason to rebut the inference of discrimination created by the petitioner's prima facie case. *Id.*, *McDonnell Douglas*, 411 U.S. at 802. Finally, the plaintiff must show that the reasons offered by the defendant are pretextual. *Id.* The ultimate burden of proof however, always remains on the plaintiff. *Burdine*, 450 U.S. at 256.

In the case *sub judice*, the Court held that the plaintiff met her initial burden of establishing a prima facie case. *See, Pegues*, 699 F.2d at 774. *Burdine* states that the defendant's rebuttal must be offered "with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext". *Burdine*, 450 U.S. at 255-56. Reasons which MSES offered explaining why Hill received fewer referrals than she thought she should have were numerous and specific. First Hill complained that she failed to receive a referral as a waitress on March 10, 1983, and states that on that same day, upon orders by

Hill's attorney, a white legal secretary went to MSES and was referred to two positions. Further testimony showed however, that this maneuver was nothing but a sham and that the secretary really was not seeking employment. Important however, was the fact that the white secretary did *not* interview with the same person that Hill did, and that the secretary's interviewer was not aware of the job order in question until the secretary specifically called the interviewer's attention to it. (Tr. 531-36) Finally, Hill's interviewer testified that she was unaware of the order when she serviced Hill. (Tr. 543-45)

Hill also complains that she did not get a referral to County Market. Her interviewer on that day said that he was unaware of the job order at the time, but that when he was confronted by Hill in a nasty manner, he referred her even though she did not meet the order's minimum qualifications. (Tr. 592-93) Next, Hill complains that MSES sometimes would "short" orders to specifically discriminate against her. Common sense however, dictates that when a vacancy is filled, there is no need to continue to refer applicants.

Some of the problems within MSES's hardcopy system in the early 1980s centered on interviewers not being aware of applications or job orders. Recent automation of the entire procedure however, has eliminated the chance of applications and job orders being misplaced, overlooked or hoarded.

While Hill laments the number of referrals she received, she was forced to admit on cross-examination that for a six month period beginning in early 1983, MSES referred her to no less than eighteen (18) positions, none

of which resulted in her being hired. (Tr. 407-08) In addition, during the life of her application, she received no fewer than thirty-seven (37) job referrals, including nineteen (19) waitress jobs; the sum total of which resulted in *one single job offer*. (Tr. 424) Obviously local employers were not impressed with Hill's qualifications and background. To illustrate Hill's dismal employment record, she stated that she held ten (10) or more jobs in the five years prior to trial and that she had quit or been fired from five or six of those.[5] (Tr. 398) Evidence of an unstable work history can in and of itself be legally sufficient to rebut a plaintiff's claim of discrimination. *Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1011 (11th Cir. 1989). Therefore, it is without question that the same type of evidence can be very significant when considering, as in this case, an applicant's referability.

Despite the large number of referrals Hill received, her own expert offers probably the most damaging evidence concerning the referrals she did not receive. Dr. Elizabeth Semko testified on cross-examination that of the 269 applicants which received referrals to the jobs in question, 203 were clearly *BETTER* qualified than Hill, and another thirty-nine (39) possessed qualifications at least equal to her. Tr. 518, *Hill*, 918 F.2d at 1237 n.10, App. 10a

MSES offered other specific evidence to show that problems inherent in the system were indeed race neutral. The agency's EEO Officer stated that his periodic

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[5] Hill was even fired from one of the jobs that MSES referred her to. The Ramada Inn dismissed her because she caused a scene and used foul language in the lobby before guests.

compliance reviews of the Hattiesburg office showed that while levels of service varied for specific groups, (black, white, male, female) the service offered was non-discriminatory. (Tr. 337) Specifically, he stated that in the relevant time period, referral problems resulted in both white males and white females being served below their benchmark levels for placement after counseling. (Tr. 337, 346-347) The same review indicated that white males were the only group that fell below its benchmark level for counseling, placement after counseling, supportive services, total applicants referred and total applicants placed.

Another review revealed that white males were again the only group served below the benchmark level for counseling and white females were alone in service below the benchmark level for placement after counseling. In addition, supportive services for all whites was below their benchmark level, especially for white males. (Tr. 341) Finally, a third review revealed that service to white females for placement after counseling was below benchmark level. In each of the above areas listed, blacks in general and black females in particular met or exceeded their benchmark levels. While problems within the system may have accounted for some disparities in service, the above evidence demonstrates that the problems did not lead to unlawful discrimination against any particular group.

Each of the reasons offered by MSES was legally sufficient to rebut Hill's prima facie case. While it is undisputed that the agency's hard copy system may have contributed to Hill's problems, MSES's detailed articulation and documentation of these problems met its *Burdine* rebuttal requirement and offered Hill a "full and fair opportunity to demonstrate pretext". *Burdine*, 450 U.S. at

255-56. As the clear evidence showed, any problem within the system proved to be race neutral. The Fifth Circuit plainly articulated in explaining its holding, "[w]e do not mean to condone inefficiency; we simply cannot punish it under Title VII". *Hill*, 918 F.2d at 1239-40, App. 16a. Other circuits have held likewise. *See, e.g., Ledoux v. District of Columbia*, 820 F.2d 1293, 1306 n.22 (D.C. Cir. 1987) (flawed personnel practices do not equate to illegal discrimination); *O'Connor v. Peru State College*, 781 F.2d 632, 638 and n.3 (8th Cir. 1986) (Title VII prohibits discrimination, not flaws in personnel relationships). *Accord, Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982). To accept Hill's argument that flawed personnel practices cannot be legitimate non-discriminatory reasons sufficient to rebut a plaintiff's prima facie case would require this Court not only to reject the Fifth Circuit's reasoning, but also similar findings in sister circuits.

Clearly, the petitioner herein does not "like" the reasons offered by MSES. That however, is not the issue. But as various courts have stated on many occasions, the reasons offered by a defendant may be good, bad or based on mistakes; they simply may not be impermissible. *See, e.g., Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1256-57 (5th Cir., 1977); *Grier v. Casey*, 643 F.Supp. 298, 308 (W.D.N.C., 1986); *Harris v. Marsh*, 679 F.Supp. 1204 (E.D.N.C., 1987); *Johnson v. Yellow Freight System*, 734 F.2d 1304, 1310 (8th Cir. 1984); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1036 (5th Cir. 1980); *Clark v. Huntsville City Board of Education*, 717 F.2d 525, 528 (11th Cir. 1983); *Jones v. Flagship International*, 793 F.2d 714, 729 (5th Cir. 1986); and many others. There is no conflict among the circuits on this well settled point.

The petitioner next tries to convince this Court that the reasons offered by MSES, if held to be legally sufficient, could be utilized to defeat meritorious discrimination claims. In essence, she argues that this case would exonerate all defendants who simply claim that they have made a mistake. Such an argument is unsupported and ignores the fact that plaintiffs have a full and fair opportunity to show that the rebuttal offered by the defendant is without merit and therefore pretextual. The Fifth Circuit refused to be swayed by Hill's argument that acceptance of MSES's reasons would, in turn, require courts to make arbitrary and unsupported conclusions. In fact, the opposite is true, as the Court cautioned against such a result when it stressed that the defendant must still offer verified, detailed and documented evidence which would allow a plaintiff the opportunity to show pretext. *Hill*, 918 F.2d at 1239-40, App. 16a.

The lower court considered all of the evidence and issued findings consistent with that evidence. The Fifth Circuit agreed that MSES offered legitimate non-discriminatory reasons for Hill's complaints. Clearly no mistake which could lead to a reversal was made. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985); *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Hill simply has failed to show any intent on behalf of MSES to discriminate against her. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977). For this Court to hold otherwise, it must find that both the District and Circuit Court's holdings were clearly erroneous. *Anderson*, 470 U.S. at 573. Because the findings in the lower Courts were based on supporting evidence, their holdings should not be disturbed.

II. THE FIFTH CIRCUIT'S RULING IN THE INSTANT CASE DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN BAZEMORE V. FRIDAY

Petitioner states that *Bazemore v. Friday*, 478 U.S. 385 (1986) holds that a regression analysis that includes less than 'all measurable variables' may serve to prove a petitioner's case. *Id.* at 400. MSES agrees with this rather simplistic recital that such evidence *may*, but not necessarily *will* prove a case of discrimination. More importantly however, MSES would point out to this Court that the assertion made by the petitioner does not support the proposition that she asserts in *this* case. The holding in *Bazemore* speaks to the *acceptability* of flawed evidence with regard to the petitioner's attempt to prove discrimination, *not* of the subsequent probative value of the evidence. Speaking specifically to that point, this Court stated, "omission of variables from a regression analysis may render the analysis less probative than it otherwise might be", and that "failure to include variables will affect the analysis' probativeness, not its admissibility" *Id.* (footnote omitted) Therefore, because the Fifth Circuit accepted Hill's evidence, but simply did not attribute to it the weight she desired, it is clear that *Bazemore* does not have the precedental value in this case that Hill would like this Court to believe.

Further, it is without question that MSES is under no obligation to accept without criticism Hill's flawed statistics.

> Statistical evidence must be regarded with a substantial degree of caution. Although competent to prove employment discrimination, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence,

> they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances".

Pegues, 699 F.2d at 766, (citations omitted). *Watson* recently held likewise:

> Nor are courts or defendants obliged to assume that plaintiffs' statistical evidence is reliable. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." ("If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded").

Watson, 487 U.S. at 996 (citation omitted)

MSES has maintained from the outset that Hill's statistical argument has numerous shortcomings. Therefore, her attempt to draw meaningful conclusions from gross referral figures which do not take into consideration such important factors as the applicant's education and experience is an exercise in futility. As *Watson* stated, deficiencies in statistics are not limited, but "emerge from the facts of particular cases". *Id.* at 997[6]. The agency's prompt

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[6] Hill argues that her statistical analysis utilized the best available information and that any deficiencies of her analysis

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criticism of Hill's evidence, in conjunction with today's liberal Federal Rules of Discovery, gave the petitioner ample opportunity to gather evidence to prove her case. She failed. It is not now the purpose of today's review to give her a second chance or another bite at the apple. As stated in a different context, the trial on the merits should be the "main event", not a "tryout on the road". *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Thus the Fifth Circuit did not refuse to consider the probative value of Hill's statistical evidence as she argues; rather it held simply that when considering *all* of the evidence, Hill failed to meet her burden of proving discrimination by a preponderance of the evidence. *Bazemore* requires nothing more.

Finally, the numerous flaws in Hill's statistical evidence aside, it is important to note again that the numbers offered by Hill simply did not show what she sought to prove. Quotas could hardly have resulted in the percentage of referrals being any closer to the racial composition of the applicant pools in today's case. This clearly shows that even if Hill did not receive as many referrals as she would have liked, the reason was certainly not because of her race.

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should therefore be overlooked. Significantly, she cites no authority for such a proposition. It is true that the numbers Hill used were provided by MSES. But as stated earlier, their reliability for what Hill seeks to prove is questionable because they were not compiled for the purpose for which she used them, nor was MSES under any obligation to maintain such an accounting.

CONCLUSION

For all of the reasons stated above, this Court should deny Hill's Petition for Writ of Certiorari.

Respectfully Submitted,

MISSISSIPPI STATE
EMPLOYMENT SERVICE, ET AL.

RICHARD D. MITCHELL*
FRED J. LOTTERHOS
P.O. Box 1699
Jackson, MS 39215-1699
(601) 961-7416

Counsel for Respondents

*Counsel of Record

August 29, 1991

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